

THE HONORABLE JAMES A. REDDEN

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Tribes of the Colville Reservation*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION *et*  
*al.*,

Plaintiffs,

vs.

NATIONAL MARINE FISHERIES SERVICE  
*et al.*,

Defendants.

Civ. No. 01-640-RE

**DECLARATION OF JOE PEONE  
IN SUPPORT OF DEFENDANTS'  
MOTION FOR SUMMARY  
JUDGMENT**

JOE PEONE deposes and says:

1. I am the Director, Fish and Wildlife Department of the Colville Confederated Tribes (the "Colville Tribes" or the "Tribes") and an enrolled member of the Tribes. I have served in this position since 1995. In my Director capacity, I oversee 81 employees in the management of the Tribes' anadromous fish, resident fish and wildlife programs on the Colville

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Reservation and usual and accustom fishing sites located throughout the upper Columbia region. I am responsible for protecting and restoring the Tribes' fish and wildlife resources and regulating their harvest. I direct the Tribes' technical and policy involvement in off-Reservation activities, such as the FCRPS consultation, that directly affect the Tribes' fish and wildlife resources and ceremonial and subsistence harvest.

2. The Colville Reservation is located in north-central Washington and was established by Executive Order in 1872. At that time, the Reservation consisted of all the lands within the United States bounded by the Columbia and Okanogan Rivers, roughly 3.0 million acres. In 1891, the Colville Tribes entered into an Agreement with United States in which the Tribes ceded the lands within the North Half of the 1872 Reservation. The ceded area consists of roughly 1.5 million acres between the Canadian border and the current northern boundary of the Reservation. In the 1891 Agreement, the Tribes expressly reserved the rights to hunt and fish, which were "not to be abridged in any way."

3. The current Reservation boundary extends on the west to the mid-channel of the Okanogan River and on the south and east to the mid-channel of the Columbia River. Major components of the Federal Columbia River Power System (FCRPS), Grand Coulee and Chief Joseph Dams and Lake Rufus Woods and Lake Roosevelt, are located within the Reservation boundaries.

4. By virtue of these two Executive Orders, the Tribes retain reserved fishing rights in both the Okanogan and Columbia Rivers from their confluence to the Canadian border as well as in all tributaries that flow in the area located between those two rivers.

5. The Colville Tribes are salmon people. Our culture and subsistence are intricately linked with salmon and steelhead runs and the fisheries they provide to the Tribes' members. However, our fisheries have been substantially degraded by the construction and operation of the FCRPS and five other dams on the Columbia River. The FCRPS completely blocks anadromous fish passage upstream of Chief Joseph Dam, cutting off access to hundreds of miles of productive spawning and rearing habitat. In addition, four federal and five non-federal dams located downstream of the Reservation kill many out-migrating juvenile and returning adult salmon and steelhead that originate in Reservation waters.

6. As a consequence, since the late 1990s, Upper Columbia River (UCR) steelhead and UCR spring Chinook salmon have been listed by the federal government as "endangered" under the Endangered Species Act. As a further consequence, we currently harvest only about 1,000 anadromous fish annually from Reservation waters. Distributed among over 9,000 members, this amounts to less than one fish for every nine members.

7. The Colville Tribes have a vital interest in recovery of both UCR spring Chinook and steelhead. Tribal members would like to harvest these fish as their ancestors did. In addition, the protection afforded by the ESA for these fish substantially constrain our ability to harvest non-listed fish in the same areas.

8. My department manages important resident fishery resources in Lake Roosevelt (behind Grand Coulee Dam). These resources are particularly important to our local economy given the blockage of all anadromous fish runs above Chief Joseph Dam. These resident fish resources (including resident Columbia River bull trout) would be significantly harmed by additional significant drawdown of Lake Roosevelt in the summer months.

9. Since the late 1990s when UCR spring Chinook salmon and steelhead were listed as endangered, little progress had been made in the recovery of these species relative to other listed salmon and steelhead elsewhere in the Columbia Basin. I have observed that available federal mitigation funding, federal dam improvements, and recovery strategies have been focused on the watersheds of the lower Columbia and Snake Rivers. In addition, federal research to improve passage survival has been targeted on Snake River species with little concern or attention to the two endangered species from the upper Columbia River. In my review of pleadings in this case prior to our participation as *amicus* in 2005, I found scant mention of, or attention to, either of the two endangered UCR species.

10. The Colville Tribes, therefore, entered the court proceedings and subsequent court-ordered Collaboration Process with the objective of (1) ensuring that the FCRPS Biological Opinion fully addressed the survival and recovery of UCR spring Chinook salmon and steelhead within the context of Section 7(a)(2) of the Endangered Species Act, (2) directing attention to the recovery needs of the Okanogan River populations of UCR spring Chinook salmon and steelhead; and (3) working to assure that changes to FCRPS operations intended to aid salmon and steelhead survival throughout the Columbia Basin did not unnecessarily or inappropriately burden our interests in Lake Roosevelt, a critical part of the Colville Reservation.

11. We were active, sovereign participants throughout the court-ordered Collaboration Process; in the Policy Working Group (PWG) and various technical committees and ad hoc workgroups. We retained expert technical and policy assistance and involved our biological and legal staff in development and review of the jeopardy standard, fish status information, analytical methods, and mitigation actions needed to ensure a successful

consultation. Our goal in the Collaboration Process was to ensure that the federal government completed a Biological Opinion that fully met the Section 7(a)(2) requirements for the listed species, particularly those from the upper Columbia River that appeared, to the Colville Tribes, to have been largely ignored through the years. We believed that a successful FCRPS consultation would be critical to the survival and recovery of the listed UCR species, the full recovery of which could then be best achieved through implementation of the recently adopted upper Columbia River recovery plan and the Northwest Power and Conservation Council's ongoing Fish and Wildlife Program.

12. I believe that the sovereign Collaboration Process was successful. The federal government was open to the ideas and views of the various sovereigns. The sovereigns were given ample opportunity to submit fish status information and debate the pros and cons of various data sets, analytical methodologies, and interpretations of the consultation standard. Hydrosystem and fish passage modeling was undertaken on numerous sovereign-recommended options to explore alternative means of achieving the survival and recovery needs of the consultation. I believe the federal government's consultation benefited significantly from the sovereign assistance, debate, and recommendations.

13. Obviously, the Collaboration Process did not reach complete consensus among all of the sovereigns. One area where we did not reach complete consensus was the overall objective of the consultation process with respect to recovery of listed species. Failure to agree on the appropriate standards limited the sovereigns' ability to craft an agreed upon set of operational and mitigation actions.

14. The Colville Tribes fully support the application of the “trending toward recovery” standard in this Section 7 consultation. Taking actions to achieve a “trend towards recovery” for each ESU is necessary to ensure both long-term survival of each species and the potential for full recovery. Achieving a positive trend is necessary to avoid just a slower trajectory to eventual extinction. While some sovereigns maintained that this standard was excessive for a single Section 7 consultation, the Colville Tribes see no other practical interpretation that both ensures short term survival and provides a real potential for recovery. If this pragmatic standard is applied to all other consultations of major federal actions affecting salmon and steelhead, the Colville Tribes believe that over time, full recovery will be achievable.

15. Another issue of importance to the Colville Tribes that was not fully resolved during the Collaboration Process was that of flow management. After extensive review and discussion on the best available scientific information on how flow levels might effect fish passage survival, the Colville Tribes became convinced that measures to enhance flow and water velocity by releasing more water from dams on the Upper Columbia River and its tributaries would provide little additional contribution to survival and recovery, except in the driest, low water years. The dry water year problem is most acute for those fish migrating out of the upper Columbia River as they must pass through seven to nine reservoirs and they do not have the transportation option available to them as occurs in the Snake River.

16. The issue of reservoir storage and flow management in years of lowest runoff still needs considerable investigation as to how water management might bolster the survival of UCR spring Chinook and steelhead. The Collaboration Process schedule did not allow resolution of this complex issue. To this end, the Colville Tribes are pleased that further study of this

complex issue has been expressly required as a Reasonable and Prudent Alternative (RPA) in the Biological Opinion.

17. The Colville Tribes provided numerous and substantial comments to the Action Agencies and NOAA Fisheries throughout the Collaboration. These comments were both informal during the Collaboration Process and formal comments on the Action Agencies' draft Proposed Action and NOAA Fisheries' draft Biological Opinion. The consultation process had much to overcome for the endangered UCR spring Chinook and steelhead, two ESUs that needed substantial increases in survival to achieve a trend toward recovery. In the upper Columbia, the Okanogan watershed's population of UCR Steelhead had the greatest extinction risk and its population of UCR spring Chinook was already extirpated. Through the comment process, the Colville Tribes had to awaken the federal government to direct their attention on the UCR species, and particularly the Okanogan populations, as their attention and efforts seemed excessively focused on fishery concerns, mitigation actions, and research, monitoring and evaluation in the lower Columbia and Snake River portions of the basin.

18. Through its Okanogan Initiative, the Tribes provided the federal government extensive opportunities for habitat improvements, safety-net propagation programs, hatchery reforms, and species (spring Chinook) reintroduction to help achieve the survival and eventual recovery of these two endangered ESUs.

19. In February 2007, I commented on behalf of the Tribes on the Action Agencies' draft Proposed Action. I stated then: that "the proposed action appears to be severely inadequate in addressing the survival and recovery of UCR Spring Chinook and UCR Steelhead."

20. In my subsequent January 2008 comments to NOAA Fisheries on its draft FCRPS Biological Opinion, I emphasized several key points: (a) the need for greater focus and mitigation actions for those ESUs with the greatest survival gaps; (b) the need for significantly more measures to increase productivity of UCR steelhead as the prospective recruits per spawner metric was still expected to be substantially less than the minimum threshold of 1.0, a greater level of which was needed to achieve a trend towards recovery; (c) the need for further investigations of dry water year flow strategies and passage losses of UCR spring Chinook and steelhead; (d) the need for greater funding certainty for additional mitigation measures; and (e) the need for a new regional governance process to oversee implementation of these measures.

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21. Although my comments pointed out deficiencies in NOAA's approach, I also noted that across the extensive spectrum of data requirements, analytical methods, and assumptions required to assess species survival and recovery potential, that NOAA Fisheries had rightfully taken a conservative approach in the face of such a magnitude of analytical uncertainties.

22. As NOAA Fisheries finalized the Biological Opinion, the Colville Tribes entered into negotiations with the Action Agencies to seek agreement on additional measures that would address my comments and reasonably ensure the survival and recovery potential of UCR spring Chinook and steelhead in the Okanogan watershed and do so with greater certainty.

23. As part of this process, the Colville Tribes developed, negotiated and finally entered into a Memorandum of Agreement (MOA) which became part of the Columbia Basin Fish Accords. The MOA addresses the Tribes' concerns regarding the draft Biological Opinion



and ensures that additional mitigation actions will be undertaken, with certainty, to ensure the Okanogan population of UCR steelhead will survive and begin trending towards recovery, and that reintroduction of UCR spring Chinook in the Okanogan will contribute similarly to the survival and recovery of that ESU. The mitigation measures funded by the MOA and their likely contributions to survival and recovery of UCR spring Chinook salmon and steelhead are discussed in greater detail in the Declaration of Stephen H. Smith.

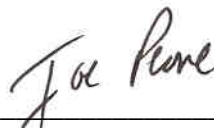
24. I believe the MOA provides additional certainty that habitat and hatchery measures provided for in the Proposed Action and the Biological Opinion will actually be implemented and provide real, measurable benefits to the listed species. For example, the MOA ensures a nearly 15 fold increase (to \$7.3 million) in annual funding for habitat and safety-net hatchery actions in the Okanogan watershed. With these funds, the Tribes anticipate expanding and restoring accessible steelhead habitat in the Okanogan River basin by 140 to 400 percent in just ten years. This will be accomplished primary through restoring tributary stream flows and minimizing other factors limiting historical steelhead and spring Chinook production. Complementing these extensive habitat improvements will be a propagation program (Chief Joseph Hatchery) to reintroduce UCR spring Chinook back into the restored tributary habitats and a significantly expanded (ten-fold increase) local steelhead broodstock and kelt reconditioning program that will ensure the steelhead are better adapted to and substantially more productive in the restored habitats. Additionally, the Tribes will have a comprehensive monitoring and evaluation program (twice the annual funding) to measure our effectiveness and adapt as needed.

25. The final BiOp, including our MOA, now addresses our earlier criticisms of the Proposed Action and draft BiOp. Action Agency mitigation funding is now clearly being focused to those ESUs with the greatest survival needs. The habitat and safety-net hatchery funding and mainstem passage improvements will, I believe, allow our wild Okanogan steelhead population to survive and productively expand into the significantly expanded and improved habitats.

26. Based on the funding and certainty provided by the MOA, and the enhanced attention on recovery of UCR spring Chinook and steelhead in the Okanogan Basin, the Colville Tribes decided to enter into the MOA and defend the resulting Biological Opinion. This Court's approval of the Biological Opinion will allow human and fiscal resources to be fully deployed towards ensuring species survival and recovery.

I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge.

Signed this 21 day of October, 2008

  
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Joe Peone

## CERTIFICATE OF SERVICE

Pursuant to Local Civil Rule 100.13(c) and FRCP 5(d), I hereby certify that on the 1<sup>st</sup> day of July, 2008, the foregoing Notice of Appearance was filed with the Court's electronic filing system which will generate automatic service upon all parties enrolled to receive such service. In addition, a true and correct copy of the foregoing will was manually served via first class U.S. mail to the following at the addresses set forth below:

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